The Reconstitution of Postwar Europe: Lineages of Authoritarian Liberalism

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Abstract: The historical conjuncture reached in the European Union recalls the spectre of authoritarian liberalism, with politically authoritarian forms of government emerging in defence of practices and ideas associated with economic liberalism. Offering a long view of this formation, the paper traces its relation to the project of European integration from the interwar breakdown of liberal democracy to the ongoing Euro-crisis, by way of its postwar and post-Maastricht reconstitution. Postwar Europe was constituted to restore liberalism and protect it not only from sovereign violence and political nationalism, but also from the perceived threat of democracy. Contributing to the taming of sovereign authority, the erosion of constituent power, and the de-politicisation of the economy, this geopolitical constitutionalism functioned during the early years of the common market to produce a relatively stable settlement, through a mixture of supranationalism, ordoliberalism, corporatism and social democracy. But after Maastricht, and in the shadow of geopolitical transformations inaugurated by the fall of the Berlin Wall and the unleashing of global capitalism, Europe was reconstituted on a neo-liberal basis which left the European Union and its Member States unable to respond to financial crisis other than through circumvention of the rules and principles of integration, technocratic discretion and political and economic coercion. This response now prompts concerns of regional imperialism and German hegemony as well as the return of anti-systemic political parties, leading to a conjuncture reminiscent of interwar authoritarianism, as any democratic or constitutional alternative to economic liberalism and its ideology of austerity is obstructed. It might therefore be worthwhile to recall that the authoritarian liberal repression of democratic socialism in the interwar period was followed by an authoritarian illiberal counter-movement of dramatic, and devastating, proportions.

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1. INTRODUCTION

If the modern constitutional state represents the diachronic unity of 'the people', a lens through which to make sense of modern political concepts such as sovereignty, self-government, democracy, and constitutionalism,[1] how is it affected by recent challenges to the state system, and in particular by the post-war project of European integration?

The purpose of this paper is to sketch an answer to that question. In short, European integration, launched as a liberal functionalist project with a desire to build a 'European Germany' and to restore the modern constitutional state after its interwar breakdown, is transforming into an authoritarian liberal project in a 'German Europe' with the effect of threatening the state's most basic constitutional achievements.[2]

This transformation of Europe, set in motion by its postwar and post-Maastricht reconstitution, and accelerating in the present Euro-crisis phase is conditioned by a fear of democracy and the threat it poses to the liberal order. In the present conjuncture, this authoritarian turn is calling into question not only principles of constitutional government, but also the master concept of popular sovereignty and the scheme of political intelligibility of the modern state.[3] But as yet, it offers no clear substitute for them.

To unfold this narrative requires consideration first of the roots of the project: the interwar breakdown of liberal constitutionalism and in particular the decline of the Weimar Republic. The European constitutional imagination is configured, or so it will be argued, in reaction not only to the rise of aggressive nationalism, but to the perceived threat of democratic socialism that emerged in the interwar years. These political threats were thought to require a militant response in order to preserve a liberal political and economic order (or 'ordo'), in a formation described by Herman Heller as 'authoritarian liberalism' (part II).

European integration responds to these concerns through a process of reconstitution along three dimensions: a conditioning of sovereign authority, with the narrower aim of preventing German hegemony (*inter-state relations*); a reconditioning of political authority, which displaces the idea of constituent power with the new rhetoric of constitutional rights, triggered by concerns to avoid political extremism (*state-society relations*); and a restructuring of the economic constitution, first through ordoliberalism and later in the shift towards neo-liberalism, with the aim of de-politicising the economy (*economic relations*) (part III).

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[1] See Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010), 69–73, 375–406, 342–367

[2] See Michael A. Wilkinson, 'The Spectre of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union', *German Law Journal* 14 (2013): 527–560 and 'Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?', *European Law Journal* 21 (2015): 313–340

[3] Cf. Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press, 2014); Chris Bickerton, *European Integration: From Nation-State to Member State* (Oxford University Press, 2013).

If these three constitutional-evolutionary dynamics combine to restore and safeguard the constitutional ideal in the wake of its interwar breakdown, the post-Maastricht phase — represented by the reunification of Germany, the failure of the European Constitutional Project and a neo-liberal constitution of Economic and Monetary Union — signposts a different path: an increasingly fractious and unsettled European constitutionalism (part IV).

Movement along this path has rapidly accelerated since the Euro-crisis, to the point that European integration is unable to maintain its animating constitutional ideals; it is beginning to reproduce — nationally and supranationally — forms of political authoritarianism in defence of economically liberal projects in general, and of austerity in particular, raising the spectre of authoritarian liberalism first experienced in the interwar years (part V).

The new forms of imperialism that accompany this authoritarian turn elicits strong reactions domestically, from both Left and Right; these are then thought to require a 'militant response', to be subdued in order to restore or maintain liberal normality. The lessons from Weimar in particular, and the interwar period more generally, as drawn by Hermann Heller and Karl Polanyi, however, suggest an internal diagnosis of liberalism's demise based on the generation of socio-economic *inequality* rather than an excessive democratic tolerance (part VI).

The paper will conclude by suggesting that a renewal of the legacy of sovereignty, self-government, democracy and constitutionalism in Europe depends on a recovery of the autonomy of the political from the economic realm. But this is demanded only by radical social movements and political parties which are marginalized by the European and domestic political establishments; whether it is compatible with the project of integration — or with conditions of contemporary capitalism — is doubtful (part VII).

2. INTERWAR: A CONSTITUTIONAL PRELUDE

To make sense of the postwar European constitutional imagination requires looking into its pre-history: namely, at the experience of the interwar period and specifically at what Carl Schmitt described as the decline of the *jus publicum Europaeum* — the 'public law' that governed relations within and between the states of Europe, and which consolidated the sovereign European state from the Peace of Westphalia to the outbreak of the First World War.[4] It was in reaction to the perceived manner of this decline that Europe was reconstituted in the aftermath of the Second World War.

[4] Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europeaum* (trans. G. L. Ulmen) (New York: Telos Press, 2003 [1950]). Cf. Benno Teschke, 'Fatal Attraction: A Critique of Carl Schmitt's International Legal and Political Theory', *International Theory* 3 (2011): 179–227; Martti Koskenniemi, 'Histories of International law: Dealing with Eurocentrism' *Rechtsgeschichte* 19 (2011): 152–176

A principal, if often unacknowledged component of classical liberal constitutionalism, is the idea of state sovereignty which represents the external face of the constituent power from which the constitution draws its authority. Through the emergence of the *jus publicum Europeaum*, constitutional authority and sovereignty became inexorably linked. The modern state acquires its internal monopoly of legitimate force and establishes the secular, political foundations of its governing arrangements: 'We, the People'. Externally, the state is recognised as the only legitimate subject of international relations, with the right to decide on matters of war and peace subject only to conventions regarding civilized warfare. Through the consolidation of this double dynamic, a European 'balance of power' is attained from the early-modern age of absolutism through to the "golden age of the classical interstate system". [5]

This is a crude snapshot of a complex picture. The emergence of the *jus publicum Europaeum* is a long and uneven historical process, but it crystallizes a series of conceptual distinctions that are key to modern constitutional theory: distinctions between the domestic and the international, the public and the private, state and society, the political and the economic.[6] It reaches its apotheosis in the German tradition of *Staatslehre*, as typified by Jellinek's formalization of the constitution, based on a holy trinity of 'state apparatus', 'territory', and 'people'.[7]

If this is the pure meaning of classical state sovereignty in the Euro-centric tradition, Carl Schmitt adds an elemental dichotomy to capture the brute historical reality of its geo-political formation, its stability dependent on the distinction between sea and land, Behemoth and Leviathan, a balance guarded by the maritime power of the British empire until its waning in the interwar period.[8] In this early-modern through modern period, a *concrete order* (a *nomos*) based on land appropriation and claim to radical title overseas is established by European imperial powers, which underwrites the foundations of the modern liberal constitutional state in its age of colonial expansion and domestic consolidation.[9]

This Euro-centric *nomos* came to a head, and an end, with the First World War, when the rules of civilized warfare were discarded and it became apparent that Europe was no longer able to maintain a global balance of power. The geo-political balance is thrown into question, however not only by the decline of the British Empire and the emergence of the United States and the Soviet Union as rival global superpowers, but also by the fate of Germany, first weakened after the Treaty of Versailles and the establishment of the League of Nations, then

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[5] Teschke, above, at 181.
[6] See e.g. Martin Loughlin, 'Ten Tenets of Sovereignty' in Neil Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2003).
[7] See Martin Loughlin, 'In defence of Staatslehre', *Der Staat* 48 (2009) 1–28.
[8] Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europeaum* (trans. G. L. Ulmen) (New York: Telos Press, 2003 [1950]), 49, 352–353.
[9] Martin Loughlin, 'Nomos' in Thomas Poole and David Dyzenhaus (eds.) *Theorists of Constitutional Crisis: Oakeshott, Hayek and Schmitt on Law, Liberty and State* (Cambridge University Press, 2015); cf. Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, (1951) 1968)), 123–157.

characterized by hegemonic rise and domestic descent into National Socialism and finally collapse and defeat in the Second World War.

It is thus not only the classical interstate system that is threatened, but also the ideological fixture of popular sovereignty that characterised the 'long nineteenth century' beginning with democratic revolutions in France and the US.[10]

This internal, domestic constitutional narrative to the collapse of the *jus publicum Europeaum* complements the geo-political frame.[11] Germany arrives late to the stage of modern political and economic development, following its own '*Sonderweg'*. Its conceptions of constitutional statehood and popular sovereignty are therefore concretized at a later stage than in France, for example, with its more deeply engrained revolutionary and republican traditions, but are for that reason less substantively entrenched in the German constitutional culture when they are placed under severe stress in the interwar period.[12]

The Weimar republic was placed under stress not only by the humiliation at Versailles and the desire for Germany to restore its former imperialist glory, lost as a result of defeat in the Great War. The Weimar regime also broke down, or so liberal constitutionalists in the interwar period argued, because it was too tolerant and over-valued ideas of liberal equality, misplaced in the political and social turmoil of the time. Weimar constitutionalism was thus charged with complacency towards the political turbulence that democracy could and had led to during the 1920's and 1930's, in Germany and elsewhere. Democracy needed to become constitutionally tamed — even 'militantly' — in order to protect itself from those at the political extremes who desired its destruction.

The constitutionalist discourse of 'militant democracy' was a direct response to the breakdown of the Weimar republic and other liberal constitutions in the interwar years.[13] The term was coined in 1937 by Karl Loewenstein, a German constitutionalist who emigrated to the United States when the Nazi party took power in 1933 and who later played a significant role in the American postwar reconstruction of West Germany.[14] Beginning in the 1930s, he had urged liberal democracy to become more aggressive in resisting the spread of Fascism as a domestic and universal social movement, in particular by actively resisting the Fascist substitution of the romantic and emotional for the rational and constitutionalist in re-conceptualizing the methods of constitutional governance.[15]

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[10] See Hannah Arendt, *On Revolution* (Penguin, 1963). Cf. Eric Hobsbawm, *The Age of Revolution: Europe 1789-1948* (Wiedenfeld and Nicholson, 1962).

[11] See Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (London: Verso, 2000), 101–115.

[12] Cf. Christoph Schönberger, 'L'Etat de la 'Theorie Generale de l'Etat': Remarkes Comparatives sur un Discipline Specifiquement Allemand' in Alain Chatriot und Dieter Gosewinkel, *Figurationen des Staates in Deutchsland und Frankreich 1870–1945* (Oldenbourg Verlag Munchen, 2006).

[13] See Karl Loewenstein, 'Militant Democracy and Fundamental Rights Part 1', *The American Political Science Review* 3 (1937): 417–432 and 'Autocracy versus Democracy in Contemporary Europe Part 1', *The American Political Science Review* 29 (1935): 571–593.

[14] See R. Kostal, The Alchemy of Occupation: Karl Loewenstein and the Legal Reconstruction of Nazi Germany, 1945–1946', *Law and History Review* 29 (2011): 1–52.

[15] Loewenstein, 'Militant Democracy and Fundamental Rights Part 1', 424.

Constitutionalism, according to Loewenstein (writing in the mid–1930's) was under severe and imminent threat in numerous European states, both from Fascism and also, if to a lesser degree, from Communism. It could not be protected by liberal democratic *tolerance*. Rather, it required *'militant'* — meaning extraordinary - constitutional protection, including the use of emergency powers and the suspension of fundamental rights and other constitutional guarantees if necessary.[16] Instead, the Weimar Republic, Loewenstein insisted, "foundered on its own concepts of constitutional legality, which opened the way to power for Hitler."[17]

Fascism, in Loewenstein's view, was neither a cogent political ideology nor a coherent political program, but "the most effective political technique in modern history", serving opportunistically the purposes of attaining and maintaining political power. Democracy must fight it on level terms: in Loewenstein's own memorable words, it must "fight fire with fire".[18] Otherwise, liberal democracy would be manipulated by undemocratic and illiberal creeds, using it for its own destruction "under cover of the constitutional protection afforded by fundamental rights and the rule of law,"[19] which would be casually discarded once power had been attained.

But 'militant democracy', for Loewenstein, meant 'militant liberalism'. The goal of 'militant democracy' was to serve and protect liberal capitalism as much as to defend liberal civil and political rights. Capitalism thrives, he argued, because of the predictability of the rule of law, and not because of, but actually *in spite o*f democracy and its potential irresponsibility towards the economy. In the same way that militant democracy was supposed to protect political liberalism from democracy, it was also, and just as importantly, supposed to protect *economic liberalism and capitalism* from democracy. In both cases, it meant a replacement of a constitutionalism founded on constituent power with one founded on *legality*. [20]

In this way, constitutionalists re-established a conceptual linkage between liberalism, democratic legitimacy, and capitalism that was well perceived among 19th century liberals, but whose conception of democracy was limited to a politically homogenous group of male property-holders. The spread of universal franchise, in the Weimar Republic and elsewhere, had upset this comfortable linkage. Weimar Germany exposed Europe to a new and tumultuous vision of democracy, one produced when universal suffrage was combined with class consciousness, intense party politics, parliamentary democracy, and increasing

[16] Id. at 432.
[17] Id.
[18] Id.
[19] Id.
[20] Cf. Lon Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart', *Harvard Law Review* 71 (1958): 630. Cf. *Jan-Werner Müller, Contesting Democracy: Political Ideas in Twentieth Century Thought* (Princeton University Press, 2012), 129.

local and regional claims to autonomy, including workers' councils and movements of economic democracy and democratic socialism.[21]

These socialist and democratic movements – as well as the reaction to them - were not of course limited to Weimar Germany, or even to Europe.[22] Democratic turbulence reflected broader phenomena. Liberal-capitalist constitutional stability was threatened both politically, with heightened class-consciousness and increasingly fraught class conflict, and ideologically, through the association of legitimate constitutional authority with democratic responsiveness rather than legal constraints.

If this fear of radical democracy, and specifically fear of a democratic transition to socialism (whether reformist or revolutionary), motivated the Fascist parties, the problem it posed for the conservative or liberal constitutionalist was equally apparent: "in a democratic age it was entirely possible that a legislature based on universal suffrage could chip away at the rules of property and contract which regulate the intercourse of bourgeoise society".[23] The very idea of popular sovereignty based on a 'General Will' was threatening when the politically active population (previously male property holders) was no longer a discrete and homogenous group.

The liberal-constitutional *reaction* to the perceived threat of democratic socialism and economic democracy would be disparaged by Hermann Heller as 'authoritarian liberalism.'[24] With this epithet Heller was taking aim not only at Carl Schmitt, one of the principle proponents of authoritarian liberalism and, until 1933, an 'implacable conservative opponent of the enemies of the Weimar state',[25] but also at the centrist and conservative Presidential Cabinets advised by Schmitt that ruled late Weimar until the rise to power of the Nazi party. For Schmitt and other conservative and liberal constitutionalists, authoritarianism was seen as a necessary antidote both to the fragmenting processes of democratization and social pluralisation, and to the relativism of a formal and empty legal positivism, which were weakening the German state and endangering its Constitution.[26] Schmitt's fear of radical democracy is apparent:

> Now the proletariat becomes the people, because it is the bearer of this negativity (that was Sieyes' 'third estate': which was nothing and shall become everything). It is the part of the population which does not own, which does not have a share in the produced surplus value, and finds no place in the

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[21] See Maurice Glasman, *Unnecessary Suffering* (London: Verso, 1995).
[22] See e.g. John Dewey, *The Public and Its Problems* (New York: Holt Publishing, 1927).
[23] Gopal Balakrishnan, *The Enemy*, above, 98. Cf. William Scheuerman, 'The Unholy Alliance of Carl Schmitt and Friedrich Hayek', *Constellations* 4 (1997): 172.
[24] Hermann Heller, 'Autoritärer Liberalismus', *Die Neue Rundschau* 44 (1933): 289–298, (Hermann Heller (trans S. Paulson), 'Authoritarian Liberalism?' *European Law Journal* 21 (2015): 295–301).
[25] See Keith Tribe, *Strategies of Economic Order: German Economic Discourse 1750–1950* (Cambridge University Press, 1995), 175.
[26] See Balakrishnan, above, 155–163.

> existing order… Democracy turns into proletarian democracy, and replaces the liberalism of the propertied and educated bourgeoisie.[27]

With notable exceptions in the tradition of Austrian liberalism (especially Friedrich Hayek), neither liberals nor conservatives of the interwar period envisaged the possibility of any return to the political laissez-faire of classical liberalism.[28] In Schmitt's view, restoring and maintaining liberal economic order required strong state action and even a temporary (or more permanent) suspension of constitutional democracy by commissarial (or sovereign) dictatorship.[29] The 'sound economy' — the maintenance of the conditions of the Bourgeois *Rechtsstaat* — now required the 'strong state': a motto that would later be taken up and reformulated by the Freiberg ordoliberals.[30]

In the ordoliberal reformulation, the strong state was not strong by virtue of any democratic or popular support. Rather, it was one that was capable of upholding and enforcing the rules of the liberal market economy, and this would require a strong, juridical constitution as well as strong bureaucratic institutions capable of intervening to create, or at least approximate, the conditions of the liberal market society. Whatever role democracy took in such a state (if any), it would have to be subordinated to these dictates.

The founding members of the Freiberg school — economist Walter Eucken, and lawyers Franz Bohm and Hanns Grossman-Doerth — first met in 1933, the year the Nazis took power in Germany, as the period characterized by Heller as 'authoritarian liberalism' was coming to a close. In working to identify the dynamics of the collapse of the Weimar republic, and to find ways of transcending the failures of classical liberalism, they would find themselves by the end of Second World War right at the intellectual centre of German post-War reconstruction.[31] With the economists and sociologists Alfred Muller-Armack, Alexander Rustow, and Wilhem Röpke (who developed softer versions of ordoliberalism based on the slogan of a 'social market economy') and with the support of Ludwig Erhard, West Germany's Minister of Economics from 1949 through 1963 and then its Chancellor from 1963 to 1966, ordoliberalism would become the dominant ideology in post-War West Germany through the 1970s, albeit in practice tempered by the practical implementation of the social market economy and effects of neo-corporatism.[32]

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[27] Carl Schmitt, *Verfassungslehre*, (trans. J. Seitzer) (Durham: Duke University Press, 2008), 271–272
[28] Cf. Tribe, above, 207–208.
[29] See generally John P. MacCormick, 'The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers' *Canadian Journal of Law and Jurisprudence* X (1997): 163–189.
[30] See Renato Cristi, *Carl Schmitt and Authoritarian Liberalism* (University of Wales Press, Cardiff, 1998); Werner Bonefeld, 'Freedom and the Strong State: On German Ordo-Liberalism' *New Political Economy* 17 (2012): 633–656.
[31] See, e.g., Tribe above; David Gerber, 'Constitutionalizing the Economy: German Neoliberalism, Competition Law and the "New" Europe' *American Journal of Comparative Law* (1994): 25–84.
[32] Id.

Ordoliberalism is a powerful rationalization of the fears of the weak democratic state, but locates that weakness in its incapacity to prevent the erosion of liberty through excessively accumulated, monopolistic, *private* power, as much as in its potential manipulation of the public powers of government. The ordoliberal focus on legal and constitutional means of protecting the liberal economic order from private excesses stressed the implementation of strict rules of market competition. Ordoliberals attributed Weimar's decline to cartelization policies and resulting state capture by private interest groups, which allowed interwar Germany to degenerate into a corporatist state-industrial nexus that led inexorably to Fascism. It was the weakness of liberal constitutionalism in fighting monopoly capitalism as much as the threat of democratic socialism that occasioned the demise of the Weimer republic.

Under these new liberal visions of the strong state, the 'sovereign people', if constitutionalized, could be reconstructed less as a threatening insurgent mass of radical constituent power, and more as a "formless source of legitimising acclamation… leaving the social property relations of old Europe unmolested."[33] Liberal constitutional theory could then be reintegrated with European capitalism in an early version of the view that, in the jargon of post-war European reconstruction, would be labelled 'restrained democracy',[34] encapsulated especially in the story of West German postwar constitutional development (in Christoph Möllers apt terms, "we are (afraid of) the people"[35]).

To put it crudely, liberal constitutionalism and liberal constitutional theory became preoccupied with the legal *manner* of Weimar's constitutional decline and transition to Fascism, to the neglect of its social and economic causes. The constitutionalist lesson was that the turn to Fascism is preventable if only extremist politics could be more firmly resisted by reinforcing liberal constitutional norms against democratic change and specifically against anti-liberal political parties (often reformulated in US constitutionalism through the rubric of preventing the 'tyranny of the majority').[36] Liberal constitutional theory substituted a normative discussion of the 'rule of law' for any concrete enquiry into the 'laws of rule', of the conditions and causes of political order or disorder.

Ordoliberalism — which *was* concerned with the causes of Weimar's decline — focused only on one side, on the danger to the economic constitution of excessive concentration of private power in an unfettered market. It neglected the political concerns of social democracy; that not only economic but also political — and therefore social — freedom must be achieved for long-term constitutional stability. If the ordoliberal question was how to prevent capitalism from corrupting the free market economy, the democratic socialist question was how to

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[33] Balakrishnan, above, 100.
[34] See also Müller, above, at 128.
[35] See Christoph Möllers, 'We are (afraid) of the People: Constituent Power in German Constitutionalism' in M. Loughlin and N. Walker (eds.) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007), 87–107.
[36] Cf. Jeremy Waldron, 'Precommitment and Disagreement' in Larry Alexander (ed.) *Constitutionalism: Philosophical Foundations* (Cambridge University Press, 1998): 271–301.

prevent the free market economy from corroding and eroding political society and solidarity.

The apparent success of the liberal constitutional re-imagination (whether ordoliberal or liberal constitutionalist), taming constituent power and sidelining of political democracy, was such that by 1966 Loewenstein concluded that, "the task of checking the bureaucracy which [Max] Weber had assigned to parliament was now effectively fulfilled by courts." Parliamentarism, which in the nineteenth century "seemed to be the ultimate in political wisdom", had by then suffered from "widespread devaluation".[37] Stability, it seemed, had largely been achieved, but on the questionable diagnosis that this was because both democracy and capitalism had been disarmed.

What was the role of European integration in this new constitutional vision? The route to restoring and maintaining the liberal constitutional ideal in the postwar period was directed through three trajectories of constitutional constraint: restraining state sovereignty, displacing radical constituent power, and softening capitalist excesses but without democratizing the economy. European integration, it will now be argued, played a significance part in each.

3. POSTWAR EUROPEAN INTEGRATION AND THE GEO-POLITICAL CONSTITUTION OF AUTHORITY

If the linchpin of the liberal political constitutionalism that had emerged during the course of the 'long 19th century' was the unconditional political authority of the state, this was conditioned in postwar Europe through the construction of international and supranational frameworks of law, politics, and the economy. This new process of constitutionalisation occurs both concretely and symbolically, formally and informally. The idea of 'geo-political' constitutionalism signifies that the conditioning of political authority occurs through institutional structures and practices *beyond the state*; this reshapes not only inter-state relations, but also state-society and economic relations *within and between* states.

In the geo-political reconstitution of Europe after the Second World War, three key interconnected questions thus emerge, relating respectively to state sovereignty, constituent power, and economic democracy: how to resolve the 'German question' (to stabilize power relations in central Europe and prevent a return of German hegemony); how to prevent domestic descent into political extremism of both Right and Left, and how to stabilize the world economic system and prevent a repeat of the financial collapse and subsequent

[37] Müller, above, 148 (quoting Loewenstein's, *Max Weber's Political Ideas in the Perspective of our Time* (Amherst: University of Massachusetts Press, 1966), 48)

uncoordinated protectionism that characterized the 1930's and proved so globally catastrophic.

3.1. RESTRAINING STATE SOVEREIGNTY: IMAGINING A *'EUROPEAN GERMANY'*

The regional question for post-war Europe was first and foremost how to constrain Germany, to prevent its reemergence as a militarily or politically hegemonic central European power. This concern was based on distrust — felt particularly keenly in France, for obvious historical reasons — of German state sovereignty. [38]

The 'German question' largely disappeared from view during the period from the Treaty of Rome (1957) until the Treaty of Maastricht (1992) due to factors partly beyond the European sphere of influence: the division of Germany into East and West; West Germany turning inward to focus on its *Wirtshaftswunder*, helped by the cancelling and restructuring of large portions of its national debt in the so-called London Agreement of 1953;[39] the broader effects of the US Marshall plan, serving economic reconstruction and trade, as well as political ends of stabilizing European liberal democracy in the hope of preventing any movement towards socialism in Europe.[40]

The classical European nation-state was no longer fully in control of its own destiny. This was clearly borne out in concrete terms by the American pressure that drove the resolution of the Suez crisis, humbling the pretensions of the United Kingdom and France to foreign policy autonomy.[41] US control over the new and decisive geo-political element after the sea and land, in its dominance of air power,[42] signalled the fading into the background of the 'German question' as a global issue.

Adenauer's West Germany — abdicating any regionally or globally hegemonic ambitions, which in any case would have been blunted by its position sandwiched between the rival superpowers — made the decisive political choice at the beginning of the Cold War to align itself with the US and with Western liberalism more generally (even at the expense of forgoing the possibility of early reunification with the East as a 'neutral power').[43]

None of this is to say that European integration was an insignificant part of the new geopolitical settlement; it was an important feature of the transatlantic bulwark against the spread of Communism as well as a vehicle for restraining

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[38] See e.g. Mette Eilstrup-Sangiovanni and Daniel Verdier, 'European Integration as a Solution to War', *European Journal of International Relations* 11 (2005): 99–135.
[39] *The London Agreement on German External Debts 1953*
[40] See Paul Sweezy, 'Is the Marshall Plan an Instrument of Peace?' *Monthly Review* 1 (1949): 80–83.
[41] See, e.g., Perry Anderson, *New Old World* (London: Verso, 2009), 10.
[42] Schmitt, *Nomos*, above, 352–353.
[43] See Thomas Risse and Daniela Engelmann-Martin, 'Identity Politics and European Integration: The Case of Germany' in A. Pagden (ed.) *The Idea of Europe: From Antiquity to the European Union* (Cambridge University Press, 2002), 296.

German ambitions, neutralizing its power through the dominance of French political influence on the process of integration from the outset with the Coal and Steel Community agreed at the Treaty of Paris in 1951.

In postwar Europe, institution-building in the form of the EU (as it is now) and the European Court of Human Rights (ECHR) could initially be viewed as an attempt to renew the *jus publicum Europaeum*, by prolonging the durability of the constitutional nation-state within Europe's evolving regional setting.[44] In this view European integration was less about inter-state politics understood as foreign affairs and more about contributing to domestic socio-economic prosperity and internal security, as the best way to avoid backsliding into political authoritarianism and the domestic oppression that accompanied it.

Any project for creating a United States of Europe was sidelined early on, despite its strong support in the interwar period, especially by the German Social Democratic Party.[45] With the failure of efforts to establish a European Political Community and European Defense Community (rejected in the French parliament), plans for political union were superseded by a supranational technocratic and juristic project and a symbolic domestic re-foundation of the constitutional state. Integration would ultimately be pushed forward by complementary and occasionally competing dynamics — uniting along teleological-economic, technocratic-juridical and symbolic-constitutional, rather than purely political or pragmatic intergovernmental lines.[46] This would occur through national as much as supranational developments.

The technocratic project to create a common market based on functional logic was associated with Jean Monnet, beginning with steps of 'de facto solidarity', in the words of the Schumann Declaration that led to the Coal and Steel Community. The juristic plan to create a federal-legal form of union was associated with the early jurisprudence of the European Court of Justice [ECJ] but encompassed a wider legal community.[47] The domestic re-foundation depended on new constitutional ethos based on human dignity, fundamental rights, and openness to international integration, often codified in basic laws, most notably in West Germany.

Accordingly, the EU was supposed to operate functionally as at most a 'quasi-federal' polity, with an idiosyncratic split between normative-technocratic authority — which became strongly supranationalised through the jurisprudence of the ECJ (and national courts), and the bureaucratic expertise of the European Commission (and later the monetary authority of the European Central Bank [ECB]) — and

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[44] See, e.g., Alan Milward, *The European Rescue of the Nation-State* (London: Verso, 1992).

[45] See Risse and Engelmann, above, 298

[46] See Ernst Haas, *The Uniting of Europe* (Stanford University Press, 1958).

[47] *Van Gend en Loos v Nederlandse Administratie de Belastingen* [1963] ECR 1 (26/93), *Costa v ENEL* [1964] ECR 585 (6/64); see Antoine Vauchez, 'The Transnational Politics of Judicialisation: *Van Gend en Loos* and the Making of the EU Polity', *European Law Journal* 16 (2010): 1; Antonin Cohen, 'Constitutionalism without Constitution: Transnational Elites Between Mobilisation and Legal Expertise in the Making of a Constitution for Europe (1940's–1960's)' *Law and Social Enquiry* 32 (2007): 109.

political power, which remained predominantly with the component national units of the Member States.[48] There was no successful attempt to recreate politically sovereign state structures at the European level.

But basic elements of political power and authority were modified as a result of European integration. Substantive Member State equality was an important feature of the constitutional framework, pushing beyond the merely formal — and in practice illusory — sovereign equality of international law. So, for example, a balance would be achieved between larger and small Member States through allocation of voting in the European Council, digressive proportionality of seats in the European Parliament, and strict unanimity in the rules for Treaty Amendment. Informally, De Gaulle's Luxembourg compromise demanded unanimity even for ordinary law-making.

European integration was also a central feature of the state's constitutional imagination, playing a real and symbolic role in reframing the constitution of domestic political authority. This is engrained in seminal constitutional texts — as in the case of the Basic Law of the Federal Republic of Germany, which together with a constitutional 'openness' to international law, commits Germany to the establishment of a 'united Europe'.[49] Beyond this, commitments to belong to the European Union and be part of the project of European integration are strongly enshrined informally — there is little imagination in any EU state (with the possible exception of the UK) of any constitutional alternative to membership of the EU (or, since Maastricht, the single currency).[50]

The goal of restraining (German) state sovereignty based on distrust of German power came to be reinterpreted from a German perspective as a collective *self*-limiting device; European integration was the external dimension of a strategy of domestic *self*-prevention. This has been called the 'German interest paradox': that it was in the German interest that German interests were not perceived as German interests. [51]

3.2. THE POLITICAL CONSTITUTION: FROM CONSTITUENT POWER TO CONSTITUTIONAL RIGHTS

In the aftermath of the Second World War, both European and US political elites attributed the collapse of inter-war European liberalism to over-politicization, and to too much democracy rather than too little. Domestic re-foundation and European integration were initially conceived as components of a de-politicisation of state-society relations, restraining democracy so as to deter any renewed threat to the re-instituted liberal order.[52] If the interwar period problematised the vision

[48] See Joseph H. H. Weiler, 'The Transformation of Europe', *Yale Law Journal* 100 (1992): 2403–2483.
[49] Preamble of the Basic Law ('GG') and Article 23(1) GG.
[50] Even in the UK, membership of the Union exerts strong constitutional pressures, see e.g. Neil Walker, 'Our Constitutional Unsettlement', *Public Law* (2014): 529–548
[51] See Franz Mayer, 'Rebels without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference', *German Law Journal* 15 (2014): 111–146.
[52] See Müller, above.

of constitutionalism underscored by state and popular sovereignty, the postwar response was to remodel it. The constitution would no longer be an expression of the authority of the constituent power, but of the authority, or even 'sovereignty', of the *law*.[53]

This displacement of constituent power in the reconstitution of Europe is not without practical moment. It profoundly reshapes the constitutional imagination and restructures national constitutional politics. The dynamic also captures the political evolution of state-society relations — specifically the reform of institutions that mediate conflicts of interest between state and society, so that they operate in a manner removed from traditional sources of democratic authority.

This trend within Western Europe, particularly in countries tainted by the rise of Fascism, to limit political democracy through the creation of juridified constitutional rights and other entrenched and judicially protected constitutional rules, accelerates throughout the postwar period, even in jurisdictions, such as France, normally resistant to the notion of 'government by judges'.[54]

The most draconian democratic limitation device is the use of 'eternity clauses' to prohibit constitutional amendment and to obstruct and evade constitutional politics (taming even the so-called derived constituent power). This is accompanied by restraints on the ordinary political-democratic process, with the outsourcing of political authority to 'counter-majoritarian' institutions — independent regulatory agencies, independent central banks, and strong constitutional courts — whose legitimacy is 'expertocratic'. Oversight of these institutions is removed from the political process, vesting increasingly in administrative and judicial bodies that are themselves insulated from the democratic constituent power that undergirds the modern political-constitutional order.[55]

These constitutional devices and institutions are meant to domesticate democracy, to avoid the perceived danger of it turning towards extremism of the Left or Right. The idea is to lock-in the constituent power through commitments that are then placed outside its control, sundering the constitution from the constituent power.

There were informal as well as formal aspects of this development. Politically, the project of European integration coincided in Continental Europe with the domestic-constitutional 'Christian-Democratic moment', a reaction to the turmoil of the interwar period that sought, above all, political and economic *stability*.[56] This was to be achieved through political centrism, Christian social thought (in both

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[53] See generally Francis Jacobs, *Sovereignty of Law: The European Way* (Cambridge University Press, 2007).
[54] See Mitchel Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (Oxford University Press, 2009).
[55] See e.g. Peter Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford University Press, 2010).
[56] See Müller, above, 132–150.

Catholic and Protestant variations), and restrained capitalism as well as restrained democracy (explored further in the next section). If this was based partly on national policy formation, it was also characterized by a growing de-politicisation of society: combining class compromise, the de-radicalisation of organized labour, and the rise of (neo-) corporatism.[57] In some countries, this de-radicalisation was even juridified and given a constitutional stamp of approval, the German Constitutional Court, for example, banning the Communist Party of Germany in 1956, setting the benchmark for Germany's new 'militant democracy'.[58]

The Constitution of the Federal Republic of Germany had thus made a 'basic decision' in favour of a 'substantive (as opposed to a formal) understanding of democracy, a set of values that had to be defended against its declared enemies.'[59] Although appearing fundamentally *illiberal* and *anti-democratic* in the abstract, this can only be properly understood in the context of a set of beliefs, captured by the idea of 'constitutional patriotism', which operates as a substitute for 'the traumatized national self-esteem of West Germans'.[60]

Just like restrained sovereignty, restrained democracy was pursued externally as well as domestically, and in combination of international and domestic commitments. The main developments were the creation of a regional human rights agreement, the European Convention on Human Rights, and the trade agreements and supranational Community institutions created by the Treaty of Paris in 1951 and then consolidated and extended by the Treaty of Rome in 1957. The European project would contribute to the movement of de-politicisation by modifying conceptions of legitimate government through its institutional structures and in particular its legal system, with the celebrated doctrines of the direct effect and supremacy of Community law as well as a principle of non-retaliation, distancing Community law from the normal politics of international agreements.[61]

But these developments required and depended on domestic constitutional reform and sustained management as much as supranational initiative. In constitutional terms, the substitution of constituent power with constitutional rights as the framing idea for the whole constitutional order thus occurs in the light of national, as much as transnational, and supra-national processes of 'constitutionalisation'.[62]

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[57] See generally Philippe C. Schmitter and Gerhard Lehmbruch (eds.), *Trends toward Corporatist Intermediation* (New York: Sage, 1979).
[58] See Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2012), 291.
[59] Jan-Werner Müller, 'A "Practical Dilemma Which Philosophy Alone Cannot Resolve": Rethinking Militant Democracy: An Introduction', *Constellations* (2012): 536.
[60] Ulrich Preuss, 'Political Order and Democracy: Carl Schmitt and his Influence' in C. Mouffe (ed.) *The Challenge of Carl Schmitt* (London, Verso, 1999).
[61] Cf. Bruno de Witte, 'The European Union as an International Legal Experiment' in De Burca and Weiler (eds.) *The Worlds of European Constitutionalism* (Cambridge University Press, 2012), 19–57.
[62] See Martin Loughlin, 'What is Constitutionalisation?' in Loughlin and Dobner (eds.) *The Twilight of Constitutionalism* (Oxford University Press, 2010), 47–73

Both regionally and domestically, "constitutionalisation," it has been argued, "came as a masterly and opportune substitute for a real constitution, and law as a convenient expedient for politics"— effectively neutralizing political disputes by turning them into mere 'technical matters'.[63] Constitutionalisation aims progressively to de-politicize and de-democratize state-society relations, replacing political and democratic deliberation with juridical and technocratic forms of decision-making and norm-setting.

In spite of, or perhaps because of, the early failures to establish a European political community based on a constitution authorized by the 'Peoples of Europe', the ECJ, and the European legal community more generally, pursued, at times aggressively, the *legal fiction* of a constitution.[64] It was this fiction that authorized the shift from political constitution-making to judicial constitutionalisation, substituting the older idea of constituent power for a new idea constitutional rights as a legitimating device in the constitutional imagination.

The interlinking of the supranational narrative with domestic constitutional developments is most famously articulated in the celebrated 'dialogue' between European courts and national courts through the so-called *Solange* jurisprudence, which prompted the construction of a set of unwritten principles of human rights law in the ECJ's jurisprudence as well as the Europeanisation of domestic projects of constitutional reform.[65]

To be sure, in European constitutional scholarship, there was always suspicion that the ECJ's increasing juridification of superior fundamental rights norms was aimed primarily at elevating its own juridical authority over that of national courts, especially constitutional courts. If the 'surface language' of the Court's jurisprudence was the language of human rights, Weiler noted, the 'deep structure' was all about supremacy.[66] But provided there was no outright conflict between domestic and supranational courts, the system could remain functional, and even productive, eventually giving rise to various theories of constitutional pluralism, pluralist constitutionalism, contrapuntal law, and so on.[67]

Constitutional rights — from being initially cast as liberal 'trumps' on governmental policy prescriptions in Dworkin's influential narrative[68] — had come to be considered merely as ubiquitous interests to be 'balanced'. But if rights inflation undermines their rhetorical power, the doctrine of proportionality increasingly begins to dominate discussion of constitutional and administrative

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[63] Antonin Cohen, 'Constitutionalism without Constitution: Transnational Elites Between Mobilisation and Legal Expertise in the Making of a Constitution for Europe (1940's–1960's)', *Law and Social Enquiry* 32 (2007): 109.

[64] Id.

[65] Cf. Brun-Otto Bryde 'The ECJ's Fundamental Rights Jurisprudence — A Milestone in Transnational Constitutionalism' in M. Maduro and L. Azoulai (eds.) *The Past and Future of EU Law* (Oxford: Hart Publishing, 2010).

[66] Weiler, 'The Transformation of Europe', above, 2403.

[67] See generally Jan Komarek and Matej Avbelj (eds.) *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing, 2012).

[68] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978).

review, in both domestic and transnational settings, maintaining judicial authority and the ideology of legalism.[69]

The substitution of constituent power and democratic legitimation with constitutional rights and proportionality is not, however, merely a formal exchange of ideas. Once European integration is placed fully into focus, juridification of the rules of European law can be seen substantively to impact on domestic constitutional ordering, elevating economic freedoms (in the form of fundamental freedoms to trade) above social and welfare rights, as well as other non-economic concerns.[70] To understand this transformation in full we have to turn to a third dynamic of constitutional change in the project of European integration: the economic constitution.

3.3. Economic Constitutionalism: From Ordoliberalism to Neo-Liberalism

'Economic constitutionalism' means not only that political authority is increasingly conditioned by particular economic interests and ideas, but that the economy is increasingly viewed as the principal ground of authority for the 'constitution' of the polity as a whole — in the sense of defining and colonising the totality of our social and political relations.[71]

The idea of an 'economic constitution', prefigured by Frankfurt school theorists Franz Neumann and Hugo Sinzheimer, but now associated with the Freiberg ordoliberals,[72] is analogous to the efforts of Karl Loewenstein in the political sphere to depoliticize the basic rules of the game. Ordoliberalism thus called for the constitutionalisation of the economic sphere, protecting the conditions underlying free market competition, in an attempt to restore and prolong liberal constitutional ideals in the post-war era, insulating the economy from democratic interference as well as the corruption of excessive private power.

Ordoliberal influence on the micro-economic constitution through the enforcement of competition rules is well known, but the idea of constitutionalizing macro-economic policy choices by making monetary stability and open financial markets as constitutionally significant as private property and contractual freedom would become vital to the shape of later European integration.[73] In the ordoliberal constitutional imagination, independence of

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[69] See Jacco Bomhoff, *Balancing Constitutional Rights* (Cambridge University Press 2013); cf. David Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2005).

[70] See Fritz Scharpf, 'The Asymmetry of European Integration: or Why Europe Can't Have a Social Market Economy', *Socio-Economic Review* 8 (2010): 211–250.

[71] See Emilios Christodoulidis, 'The European Court of Justice and 'Total Market' Thinking', *German Law Journal* 14 (2013): 2005–2020.

[72] See Franz Neumann, 'On the Preconditions and the Legal Concept of an Economic Constitution', in O. Kirchheimer and F. Neumann (eds.) *Social Democracy and the Rule of Law* tr. L. Tanner and K. Tribe (London, Allen and Unwin, 1987).

[73] See generally Karlo Tuori and Klaus Tuori, *The Euro-Crisis: A Constitutional Analysis* (Cambridge University Press, 2014).

monetary policy from political influence is as important as the independence of the judiciary.[74]

Ordoliberals and defenders of the (related) tradition of 'social market economy' considered the *laissez-faire* of classical economic liberalism to be socially and politically bankrupt. As against Friedrich Hayek's brand of 'paleo-liberalism', they saw the economic order as constructed and maintained by strong state apparatus and strong constitutional rules, and not by a spontaneous evolution of the market and market relations. The conditions for competition would not simply take care of themselves: unbridled capitalism would be as self-destructive as unbridled democracy.[75]

If to put the law above man, as Rousseau quipped, 'il faudrait des dieux' (one would need Gods), the ordoliberals answered the call for a new set of elites, who, confounding Rousseau, could, like Gods, finally 'give laws to men'.[76] If both democracy and capitalism, in other words, needed to be tamed, economic constitutionalism was the means to achieve this aim. Ordoliberalism thus placed its faith in the economic constitution and a technocratic-juridical governance apparatus rather than in the political constitution to approximate the conditions of the free market and to maintain personal freedom through the market mechanism.

There was no pristine application of ordoliberalism. Reinventing the classic legacy of state sovereignty and liberal constitutionalism for the postwar European age was in practice based on the domestic reconciliation of capitalism and democratic demands rather than any pure ordoliberal vision. In practice, during the 'golden age' of Europe from 1945–1975 ('*Les trente glorieuses*'), a postwar political consensus tempered its economism, specifically through the national (neo-) corporatist state that tamed capitalism as well as democracy, and was founded on a social contract between labour and capital.[77] Capitalism, in other words, was tempered not only by maintaining the conditions for competition but also by maintaining relatively harmonious labour relations.

In the immediate postwar period, even Leftwing vanguard parties that had previously been officially committed to revolution, including the French and Italian communists, came to support emerging liberal democratic orders in Western Europe.[78] In the words of Tony Judt, socialist parties contributed to the 'saving of capitalism from above' by implementing social policies and contributing to the construction of the European welfare state, in diverse variants.[79]

The European postwar state was charged, in other words, not only with ensuring the conditions of fair competition and price stability, but also with

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[74] See Alan T. Peacock and Hans Willgerodt, *Germany's Social Market Economy* (London: MacMillan for the Trade Policy Research Centre, 1989).
[75] Id.
[76] Cf. Hannah Arendt, *On Revolution* (London: Penguin, 1958), 184.
[77] See Chris Bickerton, *From Nation-States to Member States* (Oxford University Press, 2013), 74–113.
[78] See Müller, above, 128.
[79] See Tony Judt, *Ill Fares the Land* (London: Penguin, 2010), 47.

moderating capitalist excesses and the inequalities it resulted it. Rather than any pretension of the state to reclaiming internal or external sovereignty, it was its success in negotiating these 'diplomatic' missions that came to be seen its *raison d'etre*.

These were roles in which European integration could play a key part. As Giandomineco Majone, doyen of European integration studies, puts it:

> 'The possibility of separating economics and politics was a key, if implicit, assumption of the founders of the EEC. It was not a new idea but rather a return to a classical liberal tenet which in the nineteenth century and up to World War I had made it possible for the world economy to develop in such a fashion that "between national and international economic integration there was only a difference in degree but not in kind".'[80]

The economic benefits to be gained from free trade regimes through comparative advantage were of course part of the vernacular of classical liberalism since David Ricardo, although there was also recognition that unregulated free trade could increase inequality where levels of regional development are asymmetrical.[81]

During the 'golden age' period, European integration sought to square the circle of economic modernization and market competition together with social protection and widespread material prosperity. The actual contribution of European economic integration to growth during in this period is disputed.[82] What is not disputed is that European integration was at least compatible with the pursuit of a 'social market' at the national level, in a European version of a twin track 'embedded liberalism'.[83]

And yet, if lessons had been learnt about the complicity of liberal marketization, rigid adherence to monetary stability, and high levels of socio-economic inequality in the collapse of political liberalism in the interwar period,[84] they were soon to be forgotten. Beginning in the 1970s, domestic politics and European integration alike are gradually redirected, signalled by the renaissance of Friedrich Hayek, and ideas that only thirty years previously had been considered defunct.[85] This period presages the new constitutionalism of *neo-liberalism*.[86]

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[80] Giandomenico Majone, *Rethinking the Union of Europe Post-Crisis* (Oxford University Press, 2014), 149 (citing W. Röpke, 'Economic Order and International Law', *Recuil des Cours*, 86 (1954): 218–250).

[81] See Gunnar Myrdal, *Economic Theory and Underdeveloped Regions* (London, 1957). Myrdal was secretary general of the Economic Commission for Europe.

[82] Cf. Barry Eichengreen, *The European Economy Since 1945: Co-Ordinated Capitalism and Beyond* (Princeton University Press, 2007). See Perry Anderson, *New Old World*, above, 95–98.

[83] See Diamond Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration', *European Law Journal* 19 (2013): 303–324.

[84] See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001 (1944))

[85] See Dieter Plehwe, 'Introduction' in P. Mirowski and D. Plehwe (eds.) *The road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Cambridge: Harvard University Press, 2009)

[86] Cf. Michel Foucault, *The Birth of Bio-Politics: Lectures at the College de France* (London: Palgrave MacMillan, 2010 [1979]).

In the turn towards neo-liberalism, the neo-corporatist nation-state is replaced by what Chris Bickerton has termed the European "member state": this demanded the dismantling of the social contract between labour and capital, the unravelling of class compromise, and the freeing of capitalism from political constraints, including those deriving from concern for conceptions of the 'public good'. [87] In this period, economic privatisation is combined with the rise of administration and regulation, and the (constitutional) role of the state becomes predominantly one of correcting for market failures.[88] Under neoliberalism, market liberalization, economic efficiency, productivity, competitiveness and corporate empowerment become constitutional 'ends in themselves'.

In attempting to rewrite the terms of the postwar social contract by inserting a more laissez faire approach to political economy, two distinct avenues were pursued.[89] The first was to introduce a strict determinacy to political discourse, that of 'There is no Alternative' (i.e., 'TINA') to economic liberalisation, which is particularly associated with Margaret Thatcher, but which increasingly infected her neo-liberal and third way successors. The second involved pleading the necessity of neo-liberal rules and obligations for both domestic and global political and economic stability.[90]

Both avenues produced a substantive bias. In Fritz Scharpf's narrative, the EU's overall structural asymmetry promotes a neo-liberal turn by prioritizing liberal over republican readings of the constitution, and economically liberal over social welfare models of the relationship between state and society.[91] As Scharpf argues, the ECJ played a significant role in this constitutional prioritization by elevating European market rules into directly effective and supreme 'constitutional' law.

The effect of substituting 'integration through politics' with 'integration through law' was not normatively neutral but therefore biased in favour of liberalization. Integration through law constitutionalized a set of market liberal rules, gradually attempting to homogenize an otherwise heterogeneous set of domestic economies. [92] Judicial authority, as became clear with the judgment of *Cassis de Dijon*, would be far more easily utilized in the service of deregulation of the economy than politics would be in its reregulation.[93]

There are of course wider cultural aspects to this neo-liberal transformation, extending far beyond the EU, which contribute to the elision or even

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[87] See Bickerton, above, at 123. See also e.g. Wolfgang Streeck, *Buying Time* (Verso, 2013).
[88] Id. 107.
[89] See Bickerton, above, 95, citing the 'Goldthorpe Report' (John H. Goldthorpe, 'Problems of Political Economy after the Postwar Period' in C. S. Maier (ed.) *Changing Boundaries of the Political: Essays on the Evolving Balance Between State and Society, Public and Private in Europe* (Cambridge University Press, 1987)
[90] Id.
[91] See Fritz Scharpf, 'Legitimacy in the Multi-Level European Polity' in M. Loughlin and P. Dober (eds.) *Twilight of Constitutionalism* (Oxford University Press, 2010), 89–120.
[92] Id.
[93] Case C- 120/78 *Cassis de Dijon* [1979] ECR 649

pathologisation of ideas of the *public or common good*.[94] The upshot is that the notion of the common good understood on a political register disappears; 'instead we have optimization of market outcomes'.[95]

This should be understood not as a departure but as an exaggeration of earlier trends. As constitutional theorist Carl Joachim Friedrich noted in 1955, and Foucault would later explore in his lectures on neo-liberal governmentality in 1979, the decisive theoretical turn triggered by ordoliberalism had been to replace constituent power (or popular sovereignty) with individual economic freedom — a freedom to participate in the market — as the legitimating device for the whole constitutional order.[96] Or as German Chancellor Ludwig Erhard put it: "The revolution of our era is marked by the call for freedom rather than for class warfare", as if these must henceforth be strict alternatives.[97] The economic constitution becomes the political form of the free economy, one based on formal equality, individual economic rights and the complete abolition of class struggle. The ordoliberals adopted and adapted Schmitt's message of 'strong state, sound economy',[98] but gave the sound economy a stronger legal-constitutional and administrative foundation; technocratic exercises of governance would be subject to constitutional safeguards and constitutionalised goals.

Although it was far from straightforwardly applied or implemented at either the German or European level,[99] ordo-liberalism's particular constitutional prescriptions had reconfigured the constitutional landscape and the constitutional imagination. And its particular ideological linkage of neoclassical market economics and liberal constitutionalism was to become a key conceptual plank in the process of Europeanization and European constitutionalism.[100] Its legacy could be seen, for example, in how the self-understandings of constitutional actors in Europe (including the ECJ and the European Commission) became been increasingly conditioned by ideologies and interests that correspond to the pressures of economic rationality and the logic of market competition. These trends become more acute in time, and of course extend far beyond the EU. The cosmopolitan economic neo-liberalism that is captured in the term 'globalization' can be understood as a direct descendent of ordoliberalism's economic critique of the dangers of constituent power and democracy.[101]

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[94] Bickerton, above.
[95] Christodoulidis, above, 2017.
[96] Carl J. Friedrich, 'The Political Thought of Neo-liberalism', *American Political Science Review* 49 (1955); Michel Foucault, *The Birth of Biopolitics — Lectures at the College de France 1978–1979 (*New York: Palgrave MacMillan, 2008).
[97] Derek Rutter (trans.) *Standard Texts on the Social Market Economy: Two Centuries of Discussion* (Stuttgart: Gustav Fisher Verlag, 1982): IX.
[98] See Cristi, above.
[99] See e.g. Christian Joerges, 'What is Left of the European Economic Constitution?', *European University Institute Working Papers Law* (2004).
[100] Steph Dullien and Ulrike Guérot, 'The Long Shadow of Ordoliberalism: Germany's Approach to the Euro-crisis' *European Council of Foreign Relations* 49 (2012).
[101] See Kanishka Jayasuriya, 'Globalisation, Sovereignty and the Rule of Law: From Political to Economic Constitutionalism', *Constellations* 8 (2001): 442

The constitutional implications of *neo-liberalism* are in turn even more wide-ranging. Political and social identity is fragmented, and increasingly commodified and quantified as merely consisting of a particular collection of individualist tastes and preferences — replacing the citizen with a simple consumer of economic benefits. And in terms of the political responsiveness of the new 'debt state' and its institutions in this period, the constituency that matters is no longer the *statsvolk* but the *marktsvolk*, 'inaugurating a new stage in the relationship between democracy and capitalism'.[102] The dominant means for the state to collect resources shifts from reliance on its citizens through direct taxation, to reliance on financial investors in the global marketplace. These changes were only fully realized, however, in the context of momentous geopolitical, political and ideological shifts that hit Europe at the end of the 'short twentieth century' (1991).

4. NEO-LIBERAL EXCESSES, GEO-POLITICAL PRESSURES: 'MAASTRICHT AND ALL THAT'[103]

If the postwar period demonstrated that European integration was at least compatible with social-democratic as well as liberal constitutional ideals (if not necessarily demanded by them), the Treaty of Maastricht and its surrounding era signals a turning point.

Geo-political shifts of seismic proportions occur with the fall of the Berlin Wall, the reunification of Germany and the Collapse of the Soviet Union. With the Cold War coming to an end and the single market project (outside the domain of services) nearing completion after the legislative acceleration facilitated by the Single European Act (1986) and the ECJ's activist jurisprudence, the sense emerges that Europe needs to find a new vocation, no longer required merely as a Western liberal bulwark against the threat of Soviet Communism or as a framework of harmonized rules for a single market.

The collapse of the Soviet Union offers an obvious path, precipitating the future Enlargement programme, with membership of the EU opened up to the countries of Central and Eastern Europe provided they satisfied the 'Copenhagen' criteria, respecting broad principles of liberal democracy and market liberalism and providing a new constitutional identity for the EU. Enlargement also prompts a discourse of constitutional closure (the 'finality' of integration),[104] which foreshadowed the ill-fated Constitutional project (and was later a factor in its rejection by the French along with associated fears of neo-liberal globalization).

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[102] See, e.g., Wolfgang Streeck, *Buying Time* (London: Verso, 2014), 79–88.
[103] Cf. Wynn Godley, 'Maastricht and all that' *London Review of Books* 14 (1992): 3–4
[104] See Joscka Fischer, 'From Confederacy to Federation: Thoughts on the Finality of European Integration' in C. Joerges, Y. Meny and J. H. H. Weiler (eds.) *What Kind of Constitution for What Kind of Polity: Responses to Joschka Fischer* (Jean Monnet Program Online Papers, 2001)

These geo-political and political reconfigurations reflected not only the triumph of liberal democracy but also the unleashing of a 'disorganised' global capitalism that had been in the making since the informal American Empire began to establish its global economic dominance in the aftermath of World War II.[105] Neo-liberal capitalism, as a political-economic system, had come to be seen as invulnerable and even invincible — as 'the end of history'[106] — since there seemed, literally, to be no longer any alternative to its free market ideology. Thatcher's 'TINA' rhetoric was thus more widely effective in the aftermath of the collapse of the Soviet Union, which also announced the emergence of the United States as a sole global superpower. "Since 1989," the former standard-bearer of Frankfurt School critical theory Jürgen Habermas suggests, "it has become impossible to break out of the universe of capitalism; the only remaining option is to civilize and tame the capitalist dynamic from within."[107]

A new phase of economic integration in Europe had complemented the neo-liberal revolution of the 1980s, facilitating the turn to financialisation of the economy through the dismantling of fetters on capital accumulation.[108] This incorporated a loosening of capital controls, with the free movement of capital eventually becoming a fundamental legal and even constitutional value in the EU. The capacity of the state to raise revenue through taxation was diminished. And the political dominance of monetarism, already unleashed in the Anglo-American Thatcher-Reagan revolution, came to provide the foundation for the project of Economic and Monetary Union [EMU] launched at Maastricht.

With its commitment to a de-politicised monetary policy based exclusively on price stability; and an independent but limited European Central Bank [ECB] (with restricted monetary tools but without the guidance of any supranational economic policy capable of dealing with uneven development, socio-economic heterogeneity, or exogenous fiscal shocks), the Maastricht Treaty attempted to supranationalise ordoliberal (and neo-liberal) principles designed for domestic constitutional consumption.[109] The seeds were sown for the debilitating political and constitutional crisis that would engulf the Eurozone economies when financial crisis hit.

But there was a geo-political dimension to this refoundation of Europe on the basis of economic and monetary union and a single currency. With the fall of the Berlin Wall inaugurating the reunification of Germany, 'the German question' — the question of how to prevent German domination of the European continent — had returned to the centre stage of European constitutional politics, where it had lain dormant for 40 years. In its compromise between French and German

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[105] See Andrew Glyn, *Capitalism Unleashed: Finance Globalisation and Welfare* (Oxford University Press, 2006); Leo Panitch and Sam Gindin, *The Making of Global Capitalism: The Political Economy of American Empire* (Verso, 2012).

[106] Francis Fukuyama, *The End of History and the Last Man* (New York: The Free Press, 1992)

[107] Jürgen Habermas, *The Crisis of the European Union: A Response* (London: Polity, 2012): 106, 113.

[108] See e.g. Agustin Menendez, 'The Existential Crisis of the European Union' *German Law Journal* 14 (2013): 453–526

[109] See Tuori and Tuori, above.

interests and ideas, EMU seemed like a continuation of the usual course of European integration. The French saw it as a further strategy to prevent or contain the hegemony of the Deutsche Mark, the new 'atom bomb' anticipated to detonate in the light of German reunification and the re-emergence of Germany as a central European hegemon.[110] But if the French got the single currency they wanted it was under the conditions the Germans demanded, with the ECB loosely modelled on the structure of the *Bundesbank*.[111]

EMU also signalled a departure, initially thought to be temporary, from the idea of European unity, and the launching of what was euphemistically referred to as 'variable geometry' or 'differentiated integration': the ability to pursue different levels of integration through opt-ins and opt-outs (further formalized at the Treaty of Amsterdam in 1997). More generally, Maastricht called an end to the singleness of the Community Method of law making, beginning an era dominated by visions of 'new governance', 'experimentalism' and the 'Open Method of Co-ordination', an era in which integration would no longer necessarily proceed in a constitutional or even legal fashion, but through 'soft law' and other informal processes of governance.[112]

Maastricht therefore also signalled a departure from the previous, functional logic that economic integration would prompt political integration, and that politicisation would then force elites to engage mass publics in European matters, eventually precipitating a process of Euro-democratisation.[113] On the contrary, EMU entrenched the *de-politicisation* of a key aspect of macro-economic policy, removing an important lever of power from the political pillars of the Member States, but without reconstructing it at the supranational political level. The new currency — a 'currency without a state' — was not only democratically unaccountable (which would hardly have differentiated it from national variants); it also lacked the social and political bonds of community to sustain it, offering a symbol of the new 'economic Messianism' of the era to follow.[114]

Finally, despite its fragmentation - with its intergovernmental pillars in the area of Justice and Home Affairs and Common Foreign and Security Policy rendering the EU into a 'Europe of bits and pieces' — Maastricht signals a move from Economic to Political Union.[115] Its most prominent symbol was the creation of Union Citizenship, an apparently dormant creature that the Court of Justice

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[110] See Majone, above, 29.
[111] See Ellie Cohen, 'The Euro, Economic Federalism, and National Sovereignty' in A. Pagden (ed.) above, 269 and Anderson, above, 29.
[112] See e.g. Joanne Scott and David M. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', *European Law Journal* 8 (2002): 1
[113] See Gary Marks and Lisbet Hooghe, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' *British Journal of Political Science* 39 (2009): 1–23, at 5.
[114] See Michael A. Wilkinson, 'Economic Messianism and Constitutional Power in a German Europe: All Courts are Equal but Some Courts are More Equal Than Others' (2014) *LSE, Law, Society and Economy Working Papers*, 26/2014, available here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2522919
[115] See Deirdre Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', *Common Market Law Review* 30 (1993): 1

nevertheless breathed some life into during the first decade of its existence, promoting cross-border mobility and prohibiting discrimination on grounds of nationality in a series of bold judgments.[116]

But 'Political Union' was nominal at worst, and half-hearted at best, given there was no attempt to construct any supranational political government. This more ambitious, constructivist, federal Constitutional vision of European integration had always existed alongside — sometimes in conflict with — ideas of re-inventing, preserving or transcending the sovereign nation-state. From the very beginning of the postwar period, the prospect of a post-national state — or of a European super-state– cast its shadow over the process of integration, or for those more federally inclined, cast its light over a path to the Promised Land. The federal project remained alive, even if only in the minds of scholars and visionaries.[117]

This shadow was partly drawn, and occasionally erased, by factors external to the EU — by questions of Enlargement; geo-political security; and relations with third countries, accession and candidate countries, and other international organizations such as NATO and the WTO. But the notion of a common European identity as central to the development of a constitutional programme of closer European union was never entirely sidelined. It was briefly revitalised by Jürgen Habermas and Jacques Derrida as a counterweight — in their view — to the belligerent, imperialist, market-fundamentalist values of the United States in their 14th February European 'manifesto', launched in reaction to the US-led invasion of Iraq.[118]

Since Maastricht, however, the idea of a supranational constitutional state has inhabited a political and constitutional 'no-man's land'. On the one hand, there seemed little prospect of political elites pushing forward with a supranational constitutional state legitimized through a pan-European representative democracy. After the German Constitutional Court's famous 'Maastricht decision', the warning signals against further integration were clearly marked.[119] It was then constitutionally laid to rest, the Lisbon decision of the same court dashing any dreams of a European federal Constitution. The ambiguous 'not yet' for a European State of its Maastricht decision morphed into a decisive 'never' with Lisbon, at least not without a revolutionary constitution on the basis of a new act of German constituent power, a rather unlikely prospect.[120] The most powerful domestic court in the region raises the demands of Germany's core domestic

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[116] See e.g. see F. Wollenschlager 'A New Fundamental Freedom Beyond Market Integration', *European Law Journal* 17 (2011): 1

[117] See Andrew Glencross and Alexander H. Trechsel (eds.) *EU Federalism and Constitutionalism – the Legacy of Altiero Spinelli* (Lanham MD: Lexington Books, 2010). Cf. Federico Mancini, 'The Case for Statehood', *European Law Journal* 4 (1995): 29–42; Joseph H. H. Weiler, 'The Case Against the Case for Statehood', *European Law Journal* (1995)

[118] Jürgen Habermas and Jacques Derrida, 'February 15th or What Binds European Together?' *Constellations* (2003)

[119] *Brunner v European Union* [1994] 1 CMLR 57

[120] See Michael A. Wilkinson, 'Political Constitutionalism in the European Union', *Modern Law Review* 76 (2012) 191–222 [198–199].

constitutional identity above those of European political integration, at once criticizing the EU's democratic legitimacy *and* proscribing further democratization.[121]

On the other hand, the prospect of regaining national sovereignty by exiting the EU is scarcely a considered option, either constitutionally or (with the notable exception of the UK) politically. Economic and monetary union had provided the new political symbol of integration, and the new supranational economic governance in the form of the European Central Bank. If this was a currency without a state, it also represented a new idea of states without a currency.

The status of the EU — and indeed of its Member States — thus remained in limbo (where is still remains): not a mere international organization but neither a fully-fledged federal super-state, an entity *sui generic* or as Jacques Delors put it, an "unidentified political object".[122]

Although this has sometimes been celebrated in the literature as Europe's *Sonderweg*,[123] Europe's inability to resolve the question of its own nature or of its constitutional consequences for its members — either as an emerging federal polity or as a project of state rebuilding — renders it exceedingly fragile in critical political and economic moments.[124] Since Maastricht, centrifugal and centripetal forces have combined to make the project look increasingly precarious, especially in relation to the constitution of Economic and Monetary Union (explored further below).

Contrary to its intent, the judicialisation of authority and increasing emphasis on liberal or 'negative' constitutionalism — on restraints of governmental power, particularly through economic constitutionalism (symbolized by the early case of *Cassis de Dijon* and the ECJ's introduction of the principle of mutual recognition)[125] — has not lead to the perfection of liberalism or the triumph of liberal constitutionalism in Europe. Instead it has led to an increasing and interrelated contestation, and outright conflict: geo-politically, between core and peripheral EU states; politically, between different levels of government (e.g., national and supranational, sub-national and supranational, and national and sub-national); and ideologically, between different substantive visions of the good life (e.g., neo-liberal, republican, social-democratic).[126] Far from subduing politics, judicial constitutionalisation of social and economic conflicts has heightened and renewed political and constitutional tensions.

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[121] *Lisbon* Case, BverfG, 2 BVE 2/08, 30 June 2009

[122] 'Speech by Jacques Delors' (Luxembourg, 9 September 1985)', available at http://www.cvce.eu/obj/speech_by_jacques_delors_luxembourg_9_september_1985-en-423d6913-b4e2-4395-9157-fe70b3ca8521.html.

[123] See J. H. H. Weiler 'In Defence of the Status Quo: Europe's Sonderweg' in J. Weiler and M. Wind (eds.) *European Constitutionalism Beyond the State* (Cambridge University Press, 2003).

[124] Cf. Neil Walker, Europe's Unresolved Constitution' in M. Rosenfeld and A. Sajo (eds.) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012)

[125] Case C- 120/78 *Cassis de Dijon* [1979] ECR 649

[126] But see Matthias Kumm, 'How Does European Union Law Fit into the World of Public Law' in J. Neyer and A. Weiner (eds.), *Political Theory of the European Union* (Oxford University Press, 2010), 125.

A fuller account of the duality between supranational normative structure and national political power ('dual supranationalism')[127] must therefore reject any formalistic picture of a balanced bifurcation of legal and political pillars and capture their dysfunctional inter-relation: signified by two decades of doubt, beginning with the political and constitutional challenges to Maastricht in the French and Danish referenda, and in the German Constitutional Court; continuing through the failed Constitutional experiment and subsequent 'reform' Treaty of Lisbon; and culminating with the Euro-crisis and the more direct constitutional challenges that has brought in its wake.

An account of Europe's *Sonderweg* now needs to be corrected and updated to include the effects of asymmetric domestic political power and authority and a single currency that deprives Member States of the Eurozone of one of the few levers left to regain competitiveness. The substantive constitutional effects of an economic supranationalism spearheaded by the symbolic unity of a single currency and an (increasingly) asymmetric political inter-governmentalism are captured in the voguish label, a 'German Europe'.[128] Is this Europe's new *Sonderweg*?

5. EURO-CRISIS: THE SPECTRE OF AUTHORITARIAN LIBERALISM

The cumulative effect of integration in its ordo- and neo-liberal phases and especially in the post-Maastricht construction of EMU has been to transform the constitutional state by opposing (rather than uniting) state-society relations: delinking the sovereign powers of the state from the constituent power of the people. This is a foundational shift, because central to the constitutional imagination has always been not only that the powers of the state have to be limited (as liberalism recommends), but that they have to be limited in the name of 'the people' or at least recognizable as a process of collective *self*-limitation (as democracy demands). In the neo-liberal constitution, by contrast, the powers of the state are constrained, not by 'the people' — but by the 'the market' and by institutions that are technocratic rather than democratically responsible.[129]

Geo-political, political and ideological changes have combined to transform the Keynesian-Westphalian state of the postwar 'golden age' into a Hayekian-cosmopolitan state. Class struggle within nations is rhetorically replaced by competitive struggle between nations, liberalism is increasingly disembedded, private debt is turned into public debt, and capitalist excesses are normalised along with the need for public sector and 'structural' reform. And functional imperatives

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[127] Joseph H. H. Weiler, 'The Community System: The Dual Character of Supranationalism', *Yearbook of European Law* (1981) 267–306.
[128] See Ulrich Beck, *German Europe* (London: Polity Press, 2013).
[129] Bickerton, above, 67. See also Wolfgang Streeck, 'Markets and Peoples: Democratic Capitalism and European Integration', *New Left Review* 73 (2013): 63–71.

of market integration are advanced to justify the bypassing or suspension of normal democratic and constitutional procedures in response to a financial crisis that appears to be unending.

If politically-liberal constitutional democracy is increasingly replaced by an economically-liberal constitutional oligarchy, which increasingly interferes with everyday governing processes, this is provoking increasing popular dislocation and resentment as well as anti-systemic reaction. When 'government is both ubiquitous and increasingly remote from ordinary people', it threatens to distort the lens of the state as a symbolic representation of the people and of sovereignty as a representation of the relations between rulers and ruled.[130]

Although this is a global phenomenon, financial crisis beginning in the US with the collapse of Lehman brothers in 2007, the current conjuncture in Europe seems particularly stark. Political tensions between European core and periphery and between classes within nations are not resolved by democratic debate and contestation, but placated, if at all, by a system of managerial control and selective appeals to the obligations in the Treaty or in the domestic constitutional culture. Standing above the conflict and tensions are thus said to be 'the rules of the game': the European Treaties (the EU's 'constitutional charter'), which are supposed to prohibit, for example, unconditional bail-outs or serious debt restructuring for the periphery.[131] Constraints result not only from resistance on the part of the creditor states and the 'Troika' (i.e., the ECB, European Commission, and International Monetary Fund) to transnational solidarity, but from rhetorical principles such as the 'avoidance of moral hazard' and the maintenance of 'fiscal discipline' which are increasingly considered part of the constitutional fabric of the EU.[132]

Whether the treatment of debtor states is economically rational in any meaningful way is doubtful, certainly in the medium-term. The Troika's unwillingness to restructure Greek debt or relax strict conditionality, for example, may well frustrate the surest route to growth and to repayment of creditors. But to appear lenient would be to violate a new shibboleth of neo-liberal political-economic rationality — 'austerity' — irrespective of the extent to which that might affect national democracy and domestic economic policy.[133]

Alongside this strong insistence on austerity and 'playing by the rules' of the economic constitution (anyway self-serving given their initial violation by creditor countries such as France and Germany),[134] there has been increasing resort to highly discretionary and intrusive managerial governance as well as informal

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[130] Martin Loughlin, 'The Concept of Constituent Power' *European Journal of Political Theory* 13 (2014): 218–237

[131] Article 125 TFEU.

[132] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2 BvR 2728/13 (Jan. 14 2014)

[133] Cf. Mark Blyth, *Austerity: The History of a Dangerous Idea* (Oxford University Press, 2013).

[134] The stability and growth pact was violated early on by France and Germany but under-enforced by the European institutions and side-stepped by the Court of Justice in Case C-27/04 *Commission v Council.*

pressures.[135] This can be seen not only in the memoranda of understanding negotiated by the Troika with countries in receipt of financial assistance, and in the latitude given to the European Central Bank in its unorthodox measures of monetary policy — such as bond-buying on the secondary market, becoming a qualified 'lender of last resort', or restricting emergency liquidity to national banks facing immediate financial collapse,[136] — but also in the political coercing and cajoling from powerful states and supranational institutions.

In combination this suggests a transformation of Economic and Monetary Union from a rule-based institution to a highly discretionary one, sidelining the ordoliberal faith in liberal-constitutionalism and raising the spectre of an 'authoritarian liberalism', at once reminiscent but distant from its earlier interwar incarnation.[137]

The first, 'authoritarian', element of authoritarian liberalism shows in a twin development of de-democratisation and de-legalisation of integration and the second, 'liberal', element points to a liberal market teleology as the over-riding objective of the formal and informal constitution of Europe.

5.1. De-democratisation and De-legalisation

The continuing de-democratisation of European integration is evident in the manner through which economic crisis measures — such as the conditionality attached to European stability mechanisms, country specific recommendations in the European semester, and outright monetary transactions (OMT) promised by the ECB — increasingly avoid or evade normal democratic debate and political contestation, whether these measures are enacted by European institutions directly or are rubber-stamped by domestic actors under unusual pressures of urgency or 'emergency'.[138]

De-democratisation continues, even if now in accelerated form, the ideological currents of ordo- and neo-liberalism discussed above: not only is there 'no alternative' to market capitalism there is specifically no alternative to austerity and neo-liberal structural reforms, meaning privatization of state assets, pension reforms, increases in regressive taxation such as VAT, and public sector and social welfare cuts. These are the only means to regain competitiveness and avoid the 'moral hazard' that would otherwise be entailed by unconditional assistance or assistance that would violate terms that would (or may) have been preferred by the financial markets.

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[135] Christian Joerges, 'Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation', ZenTra Working Paper in Transnational Studies No. 06/2012 (Oldenberg and Bremen: ZenTra Centre for Transnational Studies, 2012).

[136] Cf. BVerfG, 2 BvR 2728/13 (Jan. 14 2014) ('the OMT Decision').

[137] See Michael A. Wilkinson, 'The Spectre of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union', *German Law Journal* 14 (2013): 527–560; Michael A. Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?', *European Law Journal* 21 (2015): 313–340.

[138] See Jonathan White, 'Emergency Europe', *Political Studies* 62 (2015): 300–318.

The turn towards de-legalisation is a more complex shift, not least since the move away from the normal Community method of law-making, as we saw, predates the Eurocrisis.[139] It can be found in the increasing displacement of formal legal instruments and institutions with less formal, non-legal instruments, or with outright coercion, circumventing judicial and constitutional review. These include 'hard-soft law' such as 'recommendations' and 'opinions' in place of legislation, which despite their nomenclature are *imposed* on the recipient (debtor) state, pushed through without normal procedures of democratic deliberation by domestic elites, however willingly or otherwise. The new 'Union (rather than 'Community') method' of rule-making bypasses representative institutions, national as well as European, and suffers from even greater democratic deficits than its Community predecessor.[140]

The ECJ has been unwilling, and anyway perhaps powerless to intervene. In its decision in *Pringle v Republic of Ireland* on the validity of the European Stability Mechanism (ESM),[141] the Court elevates the Member State's interest in defending the 'financial stability of the Euro zone as a whole' by offering a bail-out fund above the EU interest in respecting the constitutional framework as set out in the EU treaties or fundamental rights as guaranteed by the Charter.[142] In OMT, the ECJ — despite the protestations of the German Constitutional Court, and in its first ever referral,[143] — waved through discretionary exercise of institutional power by the ECB that goes far beyond what is suggested by its constitutional mandate. Outright and direct constitutional conflict between the two most powerful courts in the region, long postponed, now beckons.[144]

If legality was a liberal substitute for democratic legitimacy, or a counterbalance to a process of de-democratisation with deeper roots in the project of integration, the turn away from the legal form, while continuing the process of de-democratization, is a move of tremendous constitutional significance. Emergency measures are thus able to escape constitutional and administrative review by courts, which in the absence of democratic processes of norm creation represent the only avenue through which the disciplining effect of fundamental rights (whether emanating from the domestic, European, or international levels), such as the right to social security or to basic healthcare, can be secured. Indeed,

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[139] See also Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts', *Oxford Journal of Legal Studies* 35 (2015): 325–353.
[140] See Menendez, above.
[141] C-370/12 *Pringle v. Government of Ireland and the Attorney General*, 27 November, 2012
[142] See generally Jonathan Tomkin, 'Contradiction, Circumvention, and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy', *German Law Journal* 14 (2013): 169–189.
[143] *Gauweiler*, case C- 62/14.
[144] See Michael Wilkinson, 'The Euro is Irreversible! Or is it? On OMT, Austerity and the Threat of 'Grexit' (2015) *German Law Journal* 1049–1082

de-legalization itself can violate fundamental rights, denying access to justice by preventing legal challenges altogether.[145]

There is of course nothing new in government resorting to extraordinary measures — formal as well as informal — in times of crisis or emergency in an attempt to restore order, security, or a return to economic normality;[146] nor in a compliant judiciary. What is distinct in the wake of the raft of measures implemented since the Euro-crisis is the way extraordinary measures appear to be becoming the 'new normal', rather than exceptional or temporary.[147] Thus, they are rarely justified on the basis of needing to respond to an 'emergency', at least not one that will be over at any identifiable future point. Rather, their justification lies in the need to assuage the markets, and to maintain the 'singleness' of the currency. There is nothing distinctly temporary about these needs — they are the products of an ideology, not of a particular situation. In true Schmittian fashion, an enemy has even been identified; the 'enemy within' the authoritarian liberal constitutional project are those 'bad Europeans' who disregard the economic stability criteria.[148]

The gestures towards tightening up the rules and maintaining an even harsher surveillance model of Member State's budgets are proffered with little consideration of its effect on the principles of liberal democracy. The Excessive Imbalance Procedure, which stipulates sanctions against Member States for failure to conform 'is meant to be an entirely discretionary regime whose scope of delegated authority far exceeds the limits of generally allowable delegation in constitutional democracies.'[149]

Liberal constitutional 'integration through law' has been replaced by a liberal-authoritarian 'integration through fear',[150] a process not limited to economic integration: thus a weakening of usual avenues of political and legal accountability can be found in the field of the Area of Freedom, Security and Justice and in particular the development of European criminal law through mutual recognition of judgments in the framework of the European Arrest Warrant.[151]

5.2. LIBERAL ECONOMIC TELEOLOGY

What then is *liberal* about authoritarian liberalism? To be sure, authoritarian liberalism might not appear 'liberal' in any orthodox sense. De-democratisation

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145 Cf. Claire Kilpatrick, 'Are the EU Bail-Outs Immune to Social Challenge because they are not EU Law?', *European Constitutional Law Review* 10 (2014): 393–421.
146 See generally Victor Ramraj, 'No Doctrine More Pernicious? Emergencies and the Limits of Legality' in Ramraj (ed.) *Emergencies and the Limits of Legality* (Cambridge University Press, 2008), 3–29.
147 See White, above.
148 See Udo di Fabio, 'Karlsruhe Makes a Referral', *German Law Journal* 15 (2014): 107–110.
149 Fritz Scharpf, 'After the Crash: A Perspective on Multi-Level European Democracy', *European Law Journal* 21 (2015): 393; Menendez, above.
150 See Joseph H. H. Weiler, 'Editorial: Integration Through Fear', *European Journal of International Law* 23 (2012): 1–5.
151 Cf. Sandra Lavenex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy', *Journal of European Public Policy* 14 (2007): 762–779.

does not straightforwardly fit the classical liberal constitutional mind-set; de-legalisation still less so. If democracy has always had an uneasy role in the liberal constitutional imagination, the idea of the rule of law is firmly part of it, albeit a notoriously contested concept in its own right.[152]

The liberal aspect of authoritarian liberalism comes instead from a liberal economic teleology. The measures that are implemented, whether to 'stabilize' (ESM, OMT) or prevent future financial crises (Fiscal Compact), are aimed at continuing the process of market integration, fostering competitiveness between national economies, and ensuring neo-liberal structural reform in order to respect *economic* freedom.

And the presiding symbol of this new teleology of *economic* liberalism is the Euro-currency itself, the survival of which is said to represent the fate of the Euro-polity. Like the gold standard of the 1920's, the pressure to maintain the Euro now submits politics to an overwhelming economic rationality.[153] The Euro is 'irreversible', or so we are told.

This new 'economic Messianism' — a belief that only neo-liberal economics can redeem politics — requires 'liberal interventionism', where even market norms such as sovereign yields are subject to constitutional override in order to generate or replicate economic rationality under conditions that respect the 'irreversibility' of the Euro.'[154] This causes not only political but also domestic constitutional backlash. It is no surprise that conflict between domestic courts and the ECJ, long simmering, finally spilled over in the OMT reference.

The new constitutional configuration would thus be appositely characterized as based on the pursuit of a 'militant economics' rather than a 'militant democracy'. Projects of capital accumulation, it now seems, no longer need to be protected only from social democracy, or from monopoly capitalism, but from the market itself and its apparent 'irrationality' (if left to its own devices the market would have resolved unsustainable Greek debt in a different way from that imagined by the ECB).

In the absence of strong bonds of supranational community or transnational solidarity, technocratic regulation represents the principal defence in maintaining the European project, and particularly its central symbol, the Euro. But now, even this is under threat, with the placing of 'Grexit' on the table by German Finance Minister Wolfgang Schaüble; here we are firmly playing outside the rules, or playing a different game altogether: there is no legal option of exit from the single currency.[155]

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[152] See, e.g., Judith N. Shklar, *Legalism: Law, Morals and Political Trials* (Harvard University Press, 1964).
[153] See Daniel Wilsher, 'Law and the Financial Crisis: Searching for Europe's New Gold Standard', *European Law Journal* 20 (2014): 241–183.
[154] See Michael Wilkinson, The Euro is Irreversible!... Or is it? On OMT, Austerity and the Threat of 'Grexit', *German Law Journal* 16 (2015): 1049–1072.
[155] Id.

The problems are not shallow. They reflect increasing horizontal tensions, fraught relations *between* the Member States as much as between state and EU. In the current geo-political constitution of Europe, constitutional authority in one country can condition and even prevent the normal functioning of constitutional authority in another country: with rescue funds viewed in zero-sum terms, a constitution that protects democratic authority in Germany can conflict with one that protects social rights in Greece (as well as undermine the constitution defended by the ECJ). Although Germany, for example, was able to exert ordoliberal pressure on the rescue measures through legal complaints against the ESM and OMT, on the basis of a violation of the rights of the *Bundestag* to determine its own economic policies, less attention is paid to legal complaints advanced in peripheral countries, such as Greece or Portugal, of violations of the social rights of their citizens through the austerity measures imposed (or previewed) in the same rescue programmes by the Troika.[156]

German ordoliberal ideology, an increasingly dominant reference point, however far from a reality, is looking incompatible with constitutional democracy in *other* parts of the Eurozone, particularly when Germany makes having a trade surplus a "*de facto* reason of state".[157] It is not clear that a 'German Europe', even if desirable, is in any way constitutionally feasible. Germany cannot coherently insist that all other states have a macro-economic policy that looks like its own, 'because such a result is definitionally impossible' — as regards intra-EU trade, in order for some countries to enjoy a trade surplus, others must sport a trade deficit.[158] If democracy, no longer a right, must now be understood as a reward for fiscal discipline, this is a reward that could realistically only ever be offered to some.

Constitutional imbalance is now increasingly apparent.[159] This may be reaching a tipping point. The survival of the Euro requires the solidarity between members that is ruled out by its own constitution. With the constitutional challenge to OMT, the immovable object of ordoliberalism threatens to meet head-on the irresistible force of functional economic integration in a showdown between Europe's most powerful courts. Neither object nor force shows concern for the values of democratic constitutionalism, an indifference which in turn provokes domestic political and social backlash.

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[156] See Kilpatrick, above.
[157] Helen Thompson, 'Austerity as Ideology: The Bait and Switch of the Banking Crisis', *Comparative European Politics* 11 (2013): 729–736, at 730.
[158] Id.
[159] See Mark Dawson and Floris De Witte, 'Constitutional Balance after the Euro-Crisis', *Modern Law Review* 76 (2013): 817–844.

6. BACK TO THE FUTURE?

Each of the three supports of postwar European integration discussed above — conditioning (German) state sovereignty, constraining political democracy, and curtailing economic excesses — are now under considerable pressure. German hegemony, anti-systemic social movements and domestic political parties of both Left and Right, and severe economic crises have returned. The Eurozone has seen deflation and even 'secular stagnation', which, combined with severe unemployment rates in the periphery, recalls conditions in the era of the Great Depression.[160]

The domestic constitutions of many European states are increasingly shaped by external pressures in what looks like new forms of imperialism and hegemony. To be sure, these pressures caused by tensions between democracy and capitalism of course exist outside the Eurozone, and outside the EU as well as within it.[161] They extend beyond Europe's imposition of conditionality as a prerequisite for financial aid in the Eurozone periphery. Rather, they reflect the broader potential for capitalist imperialism brought about in an age where the acquisition of territory is no longer considered necessary to exert economic control over another state. A trade surplus is sufficient, as Claus Offe notes with Hungary, an EU member state but not even inside the Eurozone. [162]

And yet the EU itself is existentially threatened; to the extent that it has any cures at its disposal, these seem only to worsen the symptoms, hampered by its constitutionalised treaty obligations and reluctance to discard neo-liberal and ordoliberal economic ideology. It also has a history to take into account. 'Receivership', it has been argued, is too mild a term for the suspension of normal democratic process that countries in the periphery have been reduced to: 'occupation' by the Troika is more appropriate, suggesting as it does, analogy to "the consequences of military defeat."[163] As Fritz Scharpf puts it:

> Institutionally, agreement to these conditionalities were not defined by European legislation under the Community method or through consensus voting in the Council but through extremely asymmetric bargaining between

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[160] See Paul Krugman, 'Secular Stagnation in the Euro Area' New York Times, May 17, 2014: http://krugman.blogs.nytimes.com/2014/05/17/secular-stagnation-in-the-euro-area/?_php=true&_type=blogs&_r=0

[161] Martin Loughlin, In Defence of *Staatslehre*, *Der Staat* 26 (2010): 'The process of constitutionalisation beyond the state, as a 'freestanding process of rationalist constitutional design', operating 'without the fiction of authorization by 'the people', now 'threatens to transform itself into a new phenomenon, an "authoritarian constitutionalism", through which an "imperial network"… will seek to secure the legitimacy of its global rule'.

[162] Claus Offe, 'Europe Entrapped: Does the EU Have the Political Capacity to overcome its Political Crisis', *European Law Journal* 19 (2013): 595–611.

[163] Majone, above, 200.

> creditor and debtor governments that resembled conditions of an unconditional surrender.[164]

This new form of imperialism is bound to elicit strong social and political reaction: austerity imposed — (however much apparently self-imposed) — on peripheral euro-zone states in exchange for short-term economic bail-outs, 'risks letting loose the kind of political passions that were so destructive during the inter-war years.'[165]

These passions should be fought, according to the liberal constitutionalist, recall, by 'militant democracy', striking against any perceived threat to the established constitutional or economic order. This discourse of militant interference has explicitly returned, most prominently in relation to the EU's response to Hungary's jump to the Right and its increasingly illiberal authoritarian rule.[166] The link between the financial crisis bailouts and the reactionary turn to illiberalism in Hungary has only tentatively been explored.[167] But militancy is undoubtedly an apposite characterization of the response to the perceived threat to the established order posed by Syriza in Greece. According to Jürgen Habermas, 'forcing the Greek government to agree to an economically questionable, predominantly symbolic privatisation fund' could not be understood as 'anything other than an act of punishment against a left-wing government.'[168]

There is an alternative narrative of Weimar's decline, however, which would suggest a different lesson than one focused solely on how the EU should militantly react to political extremes or perceived threats to the rule of law. It would demand deeper consideration of *why* a threat to the constitutional order emerged in the first place. Hermann Heller, recall, attributed Weimar's decline not to excessive democratic equality or tolerance (or even to excessive private, monopolistic control of government), but to liberalism's own inability to respond to — and its complicity in — excessive *socio-economic inequality*.[169] It was this socio-economic collapse that one should focus on in order to understand liberalism's internal contradictions and ultimate demise.

Heller's narrative depends on recognition — occluded by liberal constitutionalists — that Weimar did not move directly from liberal democracy to National Socialism, but went through the interregnum of 'authoritarian liberalism'. In this period the liberal constitutional State (under a succession of conservative and centrist Chancellors beginning with Brüning's administration from 1930–1932) went to great lengths to avoid the re-differentiation of politics and the

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[164] Scharpf, above, 389

[165] Thompson, above, 730.

[166] See Jan-Werner Müller, 'Should the EU Protect the Rule of Law and Democracy Inside Member States?', *European Law Journal* 21 (2015): 141–160. Cf. Paul Blokker, *New Democracies in Crisis: A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge, 2013).

[167] See Claire Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Enquiry', EUI Working Paper, Law (2015/34)

[168] The Guardian, Thursday 16th July 2015.

[169] See, e.g., Hermann Heller, 'Political Democracy and Social Homogeneity' in B. Schlink and A Jacobson (eds) *Weimar: A Jurisprudence of Crisis* (Berkeley, University of California Press, 2000) 265.

economy that was threatened by radical social democratic movements, as well as by National Socialism.

Authoritarian liberals insisted on a centralized fiscal orthodoxy, rejecting calls for relaxation of austerity and obstructing any social democratic response to economic crisis. Such obstruction, 'undermining both vocational and regional autonomy' would occur by replacing parliamentarism with administrative directives. This was supported by many liberals of the period, because radical social democracy was perceived to be a great threat to the constitutional order, either on its own terms, or because of what it was suspected of leading to.[170] And liberals would continue to insist, despite all the evidence to the contrary, that if only left to its own devices, market liberalism 'would have delivered the goods'; that it was not liberalism but a planned socialist conspiracy that ended the prospect of peace and prosperity in the interwar years.[171] This stubbornly critical approach to social democracy wasn't restricted to the German authoritarian liberals, Austrian liberal von Mises noting that despite the dangers of fascism and its makeshift nature, it will be forever acclaimed for saving the continent from socialism and the attendant dangers to private property, approving Engelbert Dolfuss's crushing of labour and social democracy in Austria in the 1930's.[172]

Inequality — always the Achilles heel of liberalism — has returned to prominence as a political problem, in Europe as well as globally,[173] reactivating debates from the Weimar period, and even from further back to the French revolutionary foundations of the Rousseauian constitutional tradition.[174] Clear echoes of Heller's claim are evident today, despite the many differences in the constitutional landscape of contemporary Europe.[175] Material freedom for the many and not just the few remains elusive. This is emerging as a constitutional problem.

And as meticulously recounted by Karl Polanyi, the breakdown of liberalism and turn to Fascism in this interwar interregnum was itself a global phenomenon, and one directed primarily by the political response to the market system and the submission of politics to economic rationality entailed by slavish adherence to the international gold standard.[176] The extraordinary pressure built up in an effort to maintain the gold standard, compelling monetary contraction, deflation and severe

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[170] In 1935 the cabinet of Laval in France undertakes similar authoritarian measures to save the Franc under enabling laws that bypass ordinary parliamentary debate, see Loewenstein, 'Autocracy versus Democracy in Contemporary Europe' (1935) *The American Political Science Review*, 571–593.
[171] Polanyi, above, 150.
[172] See Alexander Somek, 'Austrian Constitutional Doctrine 1933 to 1938', in Christian Joerges and Navraj Singh-Ghaleigh (eds.) *Darker Legacies of Law in Europe* 361, 362 (Hart Publishing, 2003).
[173] See especially Thomas Piketty, *Capital in the 21st Century* (Harvard University Press, 2014)
[174] See M. Goldoni, 'Rousseau's Constitutionalism' in M. Wilkinson and M. Dowdle (eds.) *Constitutionalism beyond Liberalism* (CUP, 2016).
[175] See Michael A. Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?', *European Law Journal* 21 (2015): 313–340.
[176] See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001 (1944)).

unemployment in the interwar period, would eventually be released in spectacular fashion. The path this unilateral abandonment of international norms would then take varied a great deal: from the New Deal in the US, to Welfarism in Britain and National Socialism in Germany.

Where market liberal ideology was strongly maintained and social democracy repressed in practice by authoritarian means, with the market suspended but only in the interests of the ruling class and business elites, the conditions were created for a 'counter-movement' of devastating proportions. In this critical decade, 'the stubbornness with which economic liberals' had supported authoritarian liberal interventionism, 'merely resulted in a decisive weakening of the democratic forces which might otherwise have averted the fascist catastrophe'.[177]

To reiterate a crude assertion: Europe's post-war liberal constitutionalism focused too much on the legal manner of Weimar's decline to the neglect of its social, economic and political causes. Not politically democratic excesses, but economically liberal excesses need to be considered. It was, in Polanyi's reading, market liberal excesses and concomitant democratic deficiencies which paved the way towards Fascism.

And yet eager for ideological reasons to avoid the appearance of undermining democracy, liberal constitutionalists instead developed myriad devices to justify restricting democracy to 'save democracy from itself' (or what Loewenstein termed "fight[ing] fire with fire").[178] But dressing up a fear of democracy as itself a kind of democracy — even a *militant* democracy — leads to all sorts of contortions and distortions that confound the field of liberal constitutionalism to this day.

'Militant democracy' was always an odd expression for a philosophy that meant its opposite, i.e., that democracy must be restricted and curtailed in order to serve 'liberal' (and what would today be 'neo-liberal') ends.[179] Emasculated by the liberal constitutionalist, 'democracy' becomes indistinguishable from the rule of law. There is little regard for the substantive political or social commitments, or for the requisite social conditions that are necessary for 'democracy' or the 'rule of law' to remain a functional and stable part of Europe's 'constitutional' order.

7. CONCLUSION

European integration can be cast as a partial solution to a multi-faceted problem: how could the modern constitutional state — and the set of ideas on which it is based — survive in the aftermath of the series of devastating shocks suffered in the first half of the twentieth century? How might it repair or rebuild its political foundations in the post-war period? These questions now need to be posed again.

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[177] Ibid, 242.

[178] Loewenstein, above, 432

[179] Cf. Hans Kelsen, 'On the Essence and Value of Democracy' in Arthur Jacobson and Bernard Schlink (eds) *Weimar: A Jurisprudence of Crisis* (University of California Press, 2002) 84–110.

The legacy of Europe's liberal democratic constitutionalism is under extraordinary pressure in contemporary conditions. In reaction to authoritarian liberalism (to further de-democratisation, and even de-legalisation) there has been an extraordinary *re-politicisation* of Europe's geo-political, societal, and economic constitutions. Resistance to conditionality and austerity, for example, is emerging through anti-systemic social and political movements, as 'post-liberal' (as well as more entrenched and atavistic nationalist) alternatives to the current configuration of authoritarian liberalism and militant economics are starting to be explored, in both Left and Right variants.

And yet, whilst European and domestic political elites have attempted to cajole, coerce and micromanage the threat to economic liberalism from the Left in Greece (and elsewhere), it has been virtually impotent in response to the threat to political liberalism from the Right in Hungary (or elsewhere), despite the fact that left-wing movements are pan- and almost invariably pro-European in outlook. Response and reaction to the Eurocrisis so far is squarely in line with what Heller and Polanyi deemed to be liberalism's structural authoritarianism.

Will the attempt to recover the autonomy of the political from liberal-economic militancy, as pursued by more radical social movements such as Occupy and the Indignados, and articulated as a domestic and European programme by political parties such as Syriza and Podemos, lead to a reclaiming of political-democratic power over the economic realm? In reaction to the hegemony of ordoliberal and neo-liberal de-politicisation, the basic social and political functions of democratic constitutionalism can, it seems, only be regained from the 'bottom-up', through radical reassertion of constituent power. They will not be obtained without a struggle, as European and domestic elites attempt to repress them at all costs.

Can this occur within the Eurozone or even the European Union in conditions of global capitalism? The final irony may be that even for liberal democratic constitutionalism to have any purchase in the 21st century, the issue of the social inequalities — both within and between states — that are structurally reproduced by liberal capitalism can no longer be deferred. It seems, however, that they can be resolved neither by the Member States, nor by the Union of which they are part, at least as currently configured. Will this impotence lead to a more spectacular outburst of right-wing populism in due course, potentially armed with a more visible enemy as Europe struggles to deal with a refugee and migrant crisis? Or is there still a chance, as Heller thought, in yet more turbulent times, that a pan- European democratic solidarity might emerge?